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IN THE
Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE

Petitioners

- v. -

EVELYN COKE

Respondent

On Petition for a Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

This statement is submitted pursuant to Rule 29.6.

National Association for Home Care & Hospice, Inc. ("NAHC") is a not-for-profit organization incorporated under the laws of the District of Columbia. NAHC states that it has no parent corporation and no publicly held corporation owns any of its stock.

INTEREST OF THE AMICUS CURIAE

The National Association for Home Care & Hospice, Inc. (NAHC) is a not for profit trade association representing the interests of nearly 6,000 home and community based health care providers throughout the nation. NAHC submits this proposed amicus[1] curiae brief in support of the Petition for Writ of Certiorari by Long Island Care at Home regarding the decision of the United States Court of Appeals for the Second Circuit in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2nd Cir. 2006). [2]

NAHC has directly participated in legislative and regulatory matters involved in the companionship services exemption under the Wage & Hour law of the Fair Labor Standards Act that is at issue in this matter. NAHC members across the United States and the millions of individuals who receive their services face a risk of severe adverse impact through the Court of Appeals decision.

The Second Circuit's decision will pose a risk to the continued viability of home care services, raising costs for home care providers, increasing reimbursement obligations for government and private third-party payers, forcing undesired limits on the working hours of caregivers, and impeding access to the care settings of choice for millions of elderly and disabled citizens.

NAHC urges this Court to grant the Petition for Writ of Certiorari in order for this vital matter to receive

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[1] *Amicus* certifies that this brief was authored in whole by Counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person of entity made any monetary contribution to the preparation or submission of this brief.

[2] The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

the necessary review of significant legal and public policy concerns.

ARGUMENT

A. REVIEW BY THE U.S. SUPREME COURT IS WARRANTED AS THE QUESTIONS PRESENTED HAVE SIGNIFICANT NATIONAL IMPACT.

1. The Organization And Financing Of Home Care Services Will Be Adversely Impacted By The Decision Of The Court Of Appeals.

The Second Circuit ruling invalidated a 30 year old rule that had been the subject of two separate and extensive public rulemaking proceedings. In doing so, the Second Circuit, in a matter involving one employee and one employer, set in motion systemic changes to a health care delivery system that will cause serious impact on care recipients, caregivers, and the payers of services. Millions of this nation's elderly and disabled will be affected. Likewise public programs funding billions of dollars of home-based personal care services will face huge, unexpected cost increases.

Serious consideration must be given to the traumatic impact that the invalidation of 29 CFR §552.109(a) could have on care recipients, caregivers, and financing sources for that care. That impact cannot be understated.

Companionship services, otherwise known in health care as aide and personal care attendant service, are provided to millions of Medicare, Medicaid, TRICARE, and private pay recipients of care. They are young and old, permanently disabled and chronically ill. In 2000, the U.S. Department of Health and Human

Services reports that the number of individuals receiving home care services was 7,178,964.[3]

In 2002, Medicare expenditures for home health services provided to 2,724,000 beneficiaries totaled $9,635,000,000.[4] Medicaid expenditures for home care in 2000 reached $24.3 billion, of which $11.6 billion was spent on personal support services.[5]

The U.S. Department of Labor, Bureau of Labor Statistics, reports that 663,280 workers provide companionship services as home health aides and personal care aides.[6] Among the employers of these workers are 8,728 Medicare certified home health agencies throughout the country.[7]

On their own, these statistics demonstrate that the court's ruling can have unforeseen and unintended adverse consequences well beyond the individual petitioner and respondent. A review by this Court that will allow for the opportunity to consider these elements of the rulemaking process and others is well warranted.

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[3] *2000 National Home and Hospice Care Survey*, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, CD-ROM Series 13, No. 31 (July 2002).

[4] Centers for Medicare & Medicaid Services, Office of the Actuary, Medicare & Medicaid Cost Estimates Group, February 2004.

[5] Centers for Medicare & Medicaid Services, MSIS (formerly HCFA-2082) (www.cms.hhs.gov) September 2003.

[6] *Occupational Employment Statistics*, U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, May 2005 (www.bls.gov/oes/current/oes311011.htm"nat) . Internet search 12/11/06.

[7] Centers for Medicare & Medicaid Services, Center for Information Systems, Health Standards and Quality Bureau, November 2006.

2. The Companionship Services Exemption Is A Unique Provision In The FLSA In That It Protects Consumers Of The Services Rather Than Employers Or Employees

The 1974 amendment to the Fair Labor Standards Act (FLSA) that established the "companionship services" exemption at issue in this matter is a unique action through which Congress offered protection to a class of consumers rather than employees. The central feature of the exemption is to provide a cost protection for the elderly and the infirm who require personal care and other support services, known as companionship services, to remain in their communities and in their own homes. When exploring the remedial nature of the FLSA, there must be a balance struck in favor of that intended protected class of consumers.

The Department of Labor regulations at issue recognize the agency's responsibility to implement that protection in a manner that does not discriminate based on the nature of the employer of the person providing companionship services. Establishing a distinction in the application of the exemption based on the nature of the employer puts at risk millions of current users of companionship services. That impact justifies review by this court.

From the time of the 1974 amendment through today, all branches of the federal government have recognized the importance of providing community based care to the elderly, infirm, and disabled. For example, in 1980, Congress enacted amendments to the Medicare program to eliminate coinsurance requirements under the home health benefit in order to remove any barriers

to care in the home that might lead to more costly and less humane institutional care. Section 930(h) of the "Medicare and Medicaid Amendments of 1980," P.L. 96-499, codified at 42 USC 1395l(b)(2).

More recently, with the enactment of the Americans with Disabilities Act of 1990, Congress ensured that individuals with disabilities be afforded the opportunity to receive public services and programs in the most integrated setting appropriate to their needs. 42 USC 12101*fff*. The right of disabled individuals to community-based care under the ADA and its implementing regulations was affirmed by this Court in *Olmstead v L.C.*, 527 US 581 (1999).

The Executive Branch of the United States government also has weighed in heavily in favor of home care. The "New Freedom Initiative" was announced by President Bush on February 1, 2001 followed by Executive Order 13217, Community-Based Alternatives for People with Disabilities(June 18, 2001).

The United States Department of Health and Human Service ("HHS"), which manages many of the public home care programs, set out its implementation of the Executive Order establishing civil rights compliance activities that facilitate community integration in "Delivering on the Promise, HHS' Report to the President on Executive Order 13217." www.hhs.gov/newfreedom/eo13217.html.) The HHS initiative is a nationwide effort to remove barriers to community living for people of all ages with disabilities and long term illness.

Any interpretation of the companionship services exemption under the FLSA that is at odds with the well established principle that the elderly and disabled should be afforded all reasonable opportunity to receive care in their own homes must be examined very carefully by this Court. With the Court of Appeals' ruling, recipients of

publicly and privately funded home care services will face barriers to access to that care when it is delivered by third party employers of home care aides and personal care attendants.

Requiring public programs to fund an overtime compensation obligation greatly increases the financial costs of such care, taxing limited state and federal funds. The alternative of changing those programs into cash-type funding to the recipients to directly employ caregivers sacrifices the benefits offered with existing programs where an employer manages caregiver recruitment, training, assignment, quality assurance, and payroll administration.

The Court of Appeals' ruling also results in discrimination against elderly and disabled individuals who are incapable of directly employing companionship services caregivers. If a public program initiates a cash-type home care program in response to the court's ruling, such individuals will find themselves incapable of participating.

Similarly, if an individual incapable of maintaining the role of an employer is privately purchasing care, access will be diminished because of the higher cost of care provided by third party employers.

The administrative role of an employer is a daunting task for anyone. With the various tax and other reporting responsibilities alone, it can become a bewildering responsibility. For disabled individuals, it may be an impossible responsibility. The ruling will impose a costly overtime compensation obligation for those elderly and disabled incapable of directly employing a caregiver. That is an obligation that would not exist for those with the physical capacities and mental wherewithal to directly employ the caregivers. Congress did not intend such discriminatory application of the companionship services exemption in the FLSA.

The public rulemaking process employed by the Department of Labor in the promulgation of the companionship service rule allowed all of the factors and consequences discussed above to be fairly considered. The ruling below discards all of that learning and results in an interpretation of the FLSA that can only cause harm to those the exemption intended to protect.

3. Third Party Payment Systems Are Poorly Equipped To React On A Timely Basis To Unexpected Cost Increases.

Medicare pays for home health services through a prospective payment system, 42 USC §1395fff; 42 CFR §484.200 (HHPPS). The HHPPS payment rate is adjusted annually through the application of a "market basket index," a sort of inflation factor. 42 USC §1395fff(b)(3)(B); 42 CFR §484.225.

However, the market basket index formula and the database utilized to apply that formula are not designed to address sudden cost changes without unreasonable delay. For example, the database utilized for the inflation factor for the calendar year 2005 proposed rates includes wages and salary data from 2000. 69 F.R. 31248 (June 2, 2004).

Compounding the problems with the Medicare market basket index update is the use of a wage index for geographic variation in payment rates. 42 USC §1395fff(b)(4)(A)(ii)i; 42 CFR §484.210(c).

However, changes in home care aide wages will not affect payment rates because the home health wage index is based upon hospital services wage data. As a result, providers of companionship services will

experience increased cost and unaffected Medicare payment rates.

Medicaid payment systems are even less predictable than the Medicare HHPPS. States participating in Medicaid are required to establish payment rates sufficient to enlist enough care providers to secure services at a level of access comparable to the non-Medicaid patient population. 42 USC §1396a(a)(30)(A); 42 CFR §447.204. Typically, state Medicaid programs adjust payment rates only after individuals have lost access to necessary care. See, *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993); *Orthopedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997).

In *Ball, et al v. Bledess, et al*, the District Court held that the Arizona Medicaid program home care payment rates violated 42 USC §1396a(a)(30)(A). CIV 00-0067-TUC-EHC (D. AZ. 8/13/2004). The court noted that despite multiple studies and reports since 1998 indicating the loss of access to care triggered by inadequate payment rates, the state did not respond.

Many of the Medicaid home care programs are designed around a standard of cost effectiveness. These programs, otherwise known as home and community-based care waivers, exist only to the extent that the cost of care is less than the cost of placement in an institutional setting. 42 USC §1396h(c) The increase in costs triggered by new overtime compensation obligations threatens the viability of these waiver programs and will block home and community-based care options for currently served individuals.

TRICARE, the health services program for over eight million military dependents and retirees will also be adversely impacted. Its basic home health services program is built on the Medicare payment model referenced above. 32 CFR Part 199. In addition, its

Extended Home Care Benefit is founded on cost-effectiveness principles comparable to the Medicaid waiver programs discussed herein. 69 F.R. 44942 (July 28, 2004).

B. REVIEW IS NEEDED TO RESOLVE THE SPLIT IN THE DECISIONS OF THE COURTS OF APPEALS.

Supreme Court review is essential when the Circuit Court of Appeals have issued rulings on federal law in direct conflict with each other. Here, the Second Circuit invalidated 29 CFR §552.109(a) based on its unwillingness to afford proper deference to the U.S. Department of Labor's rulemaking powers and the longstanding assent to DoL's rule by Congress. However, the Tenth Circuit has previously held that the same rule is valid and enforceable, granting deference to the federal agency's rulemaking actions. *Johnston v. Volunteers of America, Inc.*, 213 F. 3d 559,562 (10th Cir. 2000)

That conflict leads to nationwide confusion regarding the responsibilities of home care providers and the risk of wage related liabilities that they may face. Those uncertainties are not in the best interests of their patients and care recipients. Similarly, the uncertainties caused by the split in the court's impact of health care financing and planning by Congress, state legislatures, and third party payers across the nation. Supreme Court review of this matter is necessary

C. THE DECISION OF THE COURT OF APPEALS ERADICATES THE PURPOSE AND VALUE OF PUBLIC PARTICIPATION IN RULEMAKING.

The 2001 proposed rule that would have ended the application of the third party employment rule drew an

unusually diverse set of public comments that had obvious impact on the Department of Labor's ultimate withdrawal of the proposed rule.

On two occasions, Senator Christopher S. Bond (R-MO), Chairman of the Committee on Small Business of the United States Senate, wrote to the U.S. Department of Labor urging reconsideration of the proposed rule to modify the Companionship Services Exemption. In his July 26, 2001 letter, Chairman Bond indicated that the proposed redefinition of the Companionship Services Exemption and the elimination of its application to employees employed by a third party employer "directly contradicts the intent of Congress when it passed the amendments in 1974 which included this exemption." He further states that, "this proposal attempts to achieve through regulation what the previous administration was not able to achieve through legislation." Cert. Pet. App. at 120a-121a, *Long Island Care at Home v. Coke*, PETITION FOR A WRIT OF CERTIORARI, No. 04-1315.

Chairman Bond also took great issue with the department's finding that the regulation would have little impact on the economy, calling it "nonsensical." With particular focus on the proposal to eliminate the use of the exemption for third party employers, Chairman Bond expressed great concern for the consumers of the services stating that "these services are likely to be significantly more expensive than these elderly individuals can afford, thus requiring them to become the employer instead of contracting with a third party employer. Many elderly do not care to be in this role, preferring the simplicity and reliability of using a third party who is in the business of supplying home care personnel." Id.

These concerns are mirrored in other comments submitted by the Administration on Aging of the U.S. Department of Health and Human Services, the U.S. Small Business Administration and the Ohio Department

of Mental Retardation and Developmental Disabilities, and the National Association of State Directors of Developmental Disabilities Services

NAHC also participated in the rulemaking process on the companionship services exemption. This rulemaking afforded NAHC and others a crucial opportunity to voice interests and concerns regarding the proposed rule. However, with the Second Circuit's failure to provide any deference to the Secretary, the public comments are effectively disregarded.

The standard of deference that the Supreme Court has long applied in federal agency rulemaking serves not only to recognize the expertise and responsibilities of that agency; it also provides voice to those in the public who participated in the process. With the Second Circuit's uniquely composed analysis of deference, the public participation element of the rulemaking process is rendered meaningless. In the event that the decision is allowed to stand, the message to the public will be to test the validity of a proposed rule in court before investing in rulemaking participation. The Second Circuit's decision is a clear indication that the federal judiciary has a greater voice in rulemaking than does the public.

Here, the public participants in the rulemaking were broad-based and diverse, including a union representing employed companions, government payers of companion services, members of Congress, a government rule watchdog (SBA), and employers of companions. However, after multiple amendments to the Fair Labor Standards Act, and public rulemaking endeavors in 1975 and 2001, the Second Circuit found that no deference is due the Secretary's 30 year regulation. It is necessary for the Supreme Court to address the significant issues posed by an appellate decision that has the practical affect of rendering a transparent, public rulemaking process a

meaningless exercise for the federal agency and the participating commenters on the proposed rules.

CONCLUSION

NAHC urges this court to grant the Petition for Writ of Certiorari.

Dated: December 13, 2006, Washington, DC

Respectfully Submitted,

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